PETITION OF THE FARMERS RESERVOIR AND IRRIGATION COMPANY FOR REHEARING AND FOR ENLARGEMENT OF TIME FOR ISSUANCE OF MANDATE AND STAY OF MANDATE.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

Nos. 128 and 196.

THE FARMERS RESERVOIR AND IRRIGATION COMPANY, a Corporation, PETITIONER,

v.

WILLIAM R. McCOMB, Administrator of the Wage and Hour Division of the United States Department of Labor, RESPONDENT.

WILLIAM R. McCOMB, Administrator of the Wage and Hour Division of the United States Department of Labor, PETITIONER.

v.

THE FARMERS RESERVOIR AND IRRIGATION COMPANY, a Corporation, RESPONDENT.

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PETITION OF THE FARMERS RESERVOIR AND IRRIGATION COMPANY FOR REHEARING AND FOR ENLARGEMENT OF TIME FOR ISSUANCE OF MANDATE AND STAY OF MANDATE.

The judgment of this Court was entered herein on June 27, 1949, such judgment being a modified affirmance of the judgment of the Court of Appeals for the Tenth Circuit. (167 Fed. (2d) 911)

Petitioner, The Farmers Reservoir and Irrigation Com-

pany, now respectfully petitions this Honorable Court to grant a rehearing herein for the purpose of reconsidering the issues presented and the judgment entered and for enlargement of the time for issuance of mandate and stay of mandate until this petition for rehearing has been finally disposed of by the Court. In support of this petition, Petitioner respectfully shows as follows:

I.

THE DIVISION OF THE COURT

The judgment of the lower Court in this case is affirmed, with modification, pursuant to an Opinion of the Court, which was delivered by Mr. Chief Justice Vinson in behalf of himself and six Associate Justices.

Mr. Justice Frankfurter filed a brief concurring opinion acquiescing "in the judgment that commends itself to the majority of my brethren" prefaced by the statement that this case "presents a problem for construction which may with nearly equal reason be resolved one way rather than another".

Mr. Justice Jackson filed a dissenting opinion.

II.

THE REASON FOR FILING THIS PETITION

Petitioner has re-examined and reviewed its argument before the Court in the light of the three Opinions of the Court in the case and has reached the conclusion that a petition for rehearing should be filed and a reconsideration and re-argument of the issues involved should be granted because of the great public importance of the question decided and the serious impact and threatened disastrous effect upon irrigation in all the vast semiarid western portion of the United States where the word "irrigation" and the word "agriculture" by common knowledge, Court decisions and

judicial knowledge are, for all practical purposes, synonymous and where a large portion of the millions of acres, whose crops are so necessary to the welfare of all of the United States, is irrigated by irrigation waters diverted by the farmers from the public streams through the medium of mutual irrigation companies such as Petitioner. There are, we believe, hundreds of thousands of farmers who irrigate their millions of acres of land through many hundreds of mutual irrigation companies identical with or similar to Petitioner. This method of irrigation is not unique to the several hundred farmers who, in this one part of Colorado, irrigate their one hundred thousand or so acres of land through Petitioner, their medium of securing their necessary irrigation water from the public streams, but is the common practice throughout the rest of Colorado and also in all the other semiarid States, where "agriculture" and "irrigation" are synonymous, such as Wyoming, Montana, Utah, Idaho, California, New Mexico, Arizona and parts of other States.

It is our understanding that the Administrator instituted this proceeding against Petitioner as a test case and that no similar case has been filed involving the employees of other mutual irrigation companies pending the outcome of this case. This case affects, therefore, not merely the twenty to thirty employees of Petitioner and its few hundred farmer owners, but the rights and obligations of hundreds of thousands of farmers and perhaps thousands of similar mutual irrigation company employees throughout the entire West.

We emphasize this, particularly in view of the doubt expressed by Mr. Justice Frankfurter in his concurring opinion as to the reason why the Court took jurisdiction of this case on certiorari. The "public importance" of the question involved obviously appealed to the Court when it accepted jurisdiction. That public importance, we respectfully submit, still continues. Furthermore, there was a con-

flict between Courts of Appeal which required clarification by this Court.

The effect of the majority opinion of the Court in this case, if allowed to stand, is the application of the "strict" or "narrow" construction principle to the "agricultural" exemption in the Act. This, we submit, was not the Congressional intent. We further submit that, without an extreme application of the "strict" or "narrow" construction principle to the facts in this case, the majority opinion can not be justified.

Mr. Justice Jackson, in his dissenting opinion, put it mildly when he surmised that the farmers would be "surprised" to learn that by judicial construction the ditch riders and reservoir tenders on their irrigation system, whose work, admittedly, constitutes an essential part of planting, cultivating, raising, harvesting and producing their agricultural crops, are not employed in agriculture.

Additional reasons for this petition for rehearing and reconsideration now follow.

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[1]The Court of Appeals in this instant case (167 Fed. (2d) 911, 914) expressly and purposely applied the "strict" or "narrow" construction principle to the agricultural exemption in the Act. This is contrary to the principle announced by the Second Circuit in **Damutz v. Pinchbeck, Inc.**, 158 Fed. (2d) 882, 883, where the Court stated:

> "Although this exemption provision in a remedial statute should be construed strictly, it should, of course, be given due effect. It is drawn in far reaching language which shows the intent of Congress to make the term 'agriculture' cover much more than what might be called ordinary farming activity and that is what now controls. Different definitions of 'agriculture' in other statutes but indicate different Congressional methods in dealing with other matters and cannot serve to narrow the scope of this one."

to the decision of the Fifth Circuit in **U. S. v. Turner Turpentine Co.**, 111 Fed. (2d) 400, 404, 405, where it is stated:

> "* * * It is now a settled principle of statutory construction that Congress or a legislature in legislating with regard to an industry or activity, must be regarded as having had in mind the actual conditions to which the act will apply, that is, the needs and usages of such activity. When then, Congress in passing an act like the Social Security Act, uses, in laying down a broad general policy of exclusion, a term of as general import as 'agricultural labor', it must be considered that it used the term in a

III.

THE USE BY THE COURT OF "LEGISLATIVE HISTORY" AS AN AID IN CONSTRUING THE ACT

The Congress, in the opening sentence of Section 3, states "As used in this Act—" certain words shall have a stated meaning. "Agriculture" in Section 3 (f) is given a most comprehensive meaning. There are no words of limitation. There are no words that limit the meaning of the word "agriculture" to the ordinary farm activities of farmers in the rainbelt of the United States or to the activities of farmers in the rainless belt of the United States. Congress must be regarded as having had in mind the actual and varied conditions and practices under which crops are raised in each and every portion of the United States and its territories and possessions where the Act operates.

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sense and intended it to have a meaning wide enough and broad enough to cover and embrace agricultural labor of any and every kind, as that term is understood in the various sections of the United States where the act operates. This does not mean, of course, that a mere local custom which is in the face of the meaning of a general term used in an act, may be read into the act to vary its terms. It does mean, however, that when a word or term intended to have general application in an activity as broad as agriculture, has a wide meaning, it must be interpreted broadly enough to embrace in it all the kinds and forms of agriculture practiced where it operates, that its generality reasonably extends to. * * * An examination of the cases cited in Words and Phrases, Fifth Serres, Vol. 1, p. 339 et seq., under agriculture and in 3 C. J. S., Agriculture, pages 361, 365 and 366, Sec. 1, under 'agricultural' and 'agriculture', convinces that in modern usage this is a wide and comprehensive term and that statutes using it without qualification, must be given an equally comprehensive meaning."

and to the implication of the opinion of the Ninth Circuit in **Reynolds v. Salt River Valley Water Users Assn.**, 143 Fed. (2d) 863, 866, where in the footnote is found the following:

"Appellee did not make the affirmative plea that its employees were 'employed in agriculture' within the exemption of section 13 (a) (6) of the Act. That question was not raised here or in the court below. It is a question which well may affect the practice and rulings of the Wages and Hours Division of the Department of Labor in the performance of its functions under the Act. 'Our decision is without prejudice to the disposition of the question wherever appropriately presented.' Blair v. Oesterlein, 275 U. S. 220, 225, 48 S. Ct. 87, 89, 72 L. Ed. 249."

Examples of "agriculture" are given by the Court in its opinion which include "production" of agricultural commodities. Then the same word "production" is used and defined in Section 3 (j) and, as a result of the application of this definition, Petitioner's employees are held to be engaged in the production of goods for commerce and, hence, within the general coverage of the Act. Now the Congress has expressly stated that a defined word has the defined meaning throughout the Act. There is no ambiguity in the use of the word "production" as used in either Section 3 (f) or Section 3 (j). If the same meaning shall be given to this word as used in the different Sections, then, we submit, necessarily Petitioner's employees are within the express definition of "agriculture" as they are within the "production of goods for commerce."

The Court, however, has gone outside the Act and to so-called "legislative history" to find a different meaning to the word "production" when used in one Section than when used in another. We respectfully submit that in doing this the Court has departed from its often announced rule that legislative history will be looked to in aid of construction only when the words used by Congress are not clear. It is not proper, we submit, to go outside the plain words of a Congressional Act to create the ambiguity, which is what we believe the Court has done here.

Almost contemporaneously with its opinion in this case the Court has reiterated its previously announced rule of refusal to consider legislative history where the Act is clear on its face. We quote from the opinion of Mr. Chief Justice Vinson in the case of *Ex Parte Joseph Collett, Petitioner*, decided May 31, 1949, and reported in United States Supreme Court Advance Opinions, Volume 93, page 901, 905.

> "*Third.* Petitioner's chief argument proceeds not from one side or the other of the literal boundaries

> of Sec. 1404 (a), but from its legislative history. The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' Gemsco, Inc. v. Walling, 324 US 244, 260, 89 L ed 921, 933, 65 S Ct. 605 (1945). This canon of construction has received consistent adherence in our decisions.[12]''

Furthermore, we submit, if resort to legislative history were proper at all in this case, the conclusion reached by the majority of the Court, as a result of that reference, is not sound. Even supposing the turpentine situation was the motivating reason for the inclusion of the word "production" in Section 3 (f), it was included before the Act was passed. It was not limited to turpentine or gum rosins. It is expressly directed to "any agricultural or horticultural commodities." How easy it would have been for the Congress to have limited it to turpentine or gum rosins if that was the Congressional intent. It did not do this, but directed "production" to all agricultural and horticultural commodities, knowing the definition of production in Section 3 (j). It did not change the opening sentence or clause of Section 3 to read "As sometimes used in this Act," but left it to read "As used in this Act."

We respectfully submit that the Court should not in this case have departed from its oft announced principle with reference to resort to legislative history. We furthermore submit that even though it deems it proper to do so in this case, the construction reached by the Court is unsound. Both suggestions, we believe, justify the Court's further consideration on this petition for rehearing.

IV.

THE COURT HAS DEPARTED FROM ITS PREVIOUS DECISIONS IN GROUNDING ITS OPINION ON ITS CONCLUSION AS TO THE NATURE OF PETITIONER AS AN EMPLOYER RATHER THAN UPON THE NATURE OF ITS EMPLOYEES' WORK

In its majority opinion the Court cites its earlier decision of *Kirschbaum v. Walling*, 316 U. S. 517, 86 L. Ed. 1638, to the point that if an occupation, not in itself production for commerce, has "a close and immediate tie" with the process of production, it comes within the provisions of Section 3 (j). It was upon this theory that the District Court and the Court of Appeals held that Petitioner's employees were engaged in the production of (agricultural) goods for commerce. Petitioner does not produce any goods for commerce or otherwise, so it is not the nature of Petitioner's organization that brings the Petitioner's employees within the general coverage of the Act. It is the employees' own activities. The Court so expressly held in the *Kirschbaum* case, supra, where it said (quoting from page 1648 of the L. Ed. report):

> "* * * * But the provisions of the Act expressly make its application dependent upon the character of the employees' activities. And, in any event, to the extent that his employees are 'engaged in commerce or in the production of goods for commerce,' the employer is himself so engaged. Nor can we find in the Act, as do the petitioners, any requirements that employees must themselves participate in the physical process of the making of the goods before they can be regarded as engaged in their production. Such a construction erases the final clause of Section 3 (j) which includes employees engaged 'in any process or occupation necessary to the production' and thereby does not

limit the scope of the statute to the preceding clause which deals with employees in any other manner working on such goods."

Again, in *McLeod v. Threlkeld*, 319 U. S. 491, 87 L. Ed. 1538, 1544, this Court said:

"It is the work of the employee which is decisive."

Now in the present case the Court has pitched its entire reasoning on its conclusions (erroneous conclusions as we will hereinafter point out) as to the nature of Petitioner (employer) as a mutual irrigation company rather than upon the nature of the activities of the employees themselves. This obvious departure from its earlier decisions is an additional reason, we urge, in support of the rehearing.

If Petitioner were a banking corporation, grocery company, or any other kind of employer, its nature or character of organization would be immaterial to the question here involved. The material question, as stated by the Court (p. 5), is whether the employees are engaged in the production of goods for commerce and whether those employees are employed in agriculture. The Court states that the Petitioner, as a corporate entity, owns no farms and raises no crops (p. 8). This is immaterial, we submit, if the employees are engaged in agriculture. The Court further states "irrigation, strictly defined—that is the actual watering of the soil—may no doubt be called farming." To a farmer this restricted definition of "irrigation" which would limit its meaning to the precise act of dropping this water on the land, would, for practical purposes, be useless. He has to get the water to the dropping point before it can be dropped. As appears from the stipulated acts in this case and as is commonly known, which is a fact of which all Courts, including this Court, have taken judicial notice (see cases in Petitioner's brief heretofore filed, pp. 10, et seq., 22,

et seq., and 27, et seq.), the irrigation water in the first instance is in the public streams, running sometimes close to and more times miles distant from the lands to be irrigated. This water can only be withdrawn from the public streams for agricultural purposes (or other beneficial purposes not here involved) pursuant to adjudication decrees entered by Courts of jurisdiction under the State administrative statutes.

It is necessary to get the water to the land. For this purpose ditches and reservoirs are built and maintained by the farmers directly or through their agents. The water must be diverted out of the stream and through the ditch or reservoir and into and through small lateral ditches to and on the lands to be irrigated by the labor of many individual workers, each doing an essential part of the completed whole. Then and then only is the water actually applied to the land. These various steps, from the stream to the actual application of the water to the land, are integral parts of an entire process. The work of each party is an essetnial ingredient to the "whole," which is "irrigation." If the farmer owner, or someone in his behalf, either directly or through a mutual ditch company created by him through necessity, (a) goes to the stream and diverts the water into the main ditch, (b) polices the water through the ditch and (c) in connection with all of this keeps the ditch in proper repair, such person, we submit, whether the farmer owner himself or someone else, is engaged in irrigation just as much as the man who runs the water through the small lateral on the land to be irrigated and directs it immediately to the growing plant. Each step is a part of the whole. It is some of these steps (links in an unbroken irrigation chain) which constitute the work of the Petitioner's field employees. That work, we submit, is irrigation and constitutes employment in agriculture, irrespective of the nature of the organization of Petitioner as an employer.

V.

THE COURT'S MISCONCEPTION OF THE NATURE OF PETITIONER AS A MUTUAL DITCH OR IRRIGATION COMPANY

In the next previous section of this petition, we have expressed our view that the majority opinion in this case is in conflict with the previous rulings of the Court to the effect that it is the work or activity of the employee rather than the nature of the employer that controls, both as to the coverage of the Act and the exemptions therefrom. An analysis of the majority opinion, however, shows that it is grounded upon factual statements and legal conclusions as to the nature of Petitioner, which, we respectfully submit, are not supported by the record and are at variance with the common concept and judicial determination of the nature of mutual ditch or irrigation companies, such as Petitioner.

This point is of such great importance that we earnestly entreat the Court to give its special consideration.

This case was presented to the Trial Court on a Stipulation of Facts (R. 11-98). We believe the Court has overlooked some of the important stipulated facts (and the law applicable thereto) and has drawn erroneous legal conclusions from other admitted facts.

On page 6 of the majority opinion the Court states the question involved to be as follows:

> "***. The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity. ***"

On page 7 of the majority opinion the Court poses the determinative question to be as follows:

> "In the absence of a detailed definition of agriculture we should be compelled to determine whether

> the activity concerned in the present case—the diversion, storage and distribution of water for irrigation purposes—is carried on as part of the agricultural function or is so separately organized and conducted as to be treated as an independent, nonagricultural productive function. ***"

After discussing this question stated in the two ways above quoted, the Honorable Chief Justice, in writing the majority opinion, concludes (pp. 13, 14) that Petitioner is a "separate business organization" and that

> "***. The controlling fact is that the company has been set up by the farmers as an independent entity to operate an integrated, unitary water supply system. The function of supplying water has thus been divorced by the farmers from the farming operation and set up as a separate and self-contained activity in which the farmers are forbidden, by the company's by-laws, to interfere.[18] Those employed in that activity are employed by the company, not by the farmers who own the company. The fact that the company is not operated for profit is immaterial. It is nonetheless the employer. Of course, if Congress had intended the absence of profit to be material and had provided that the employees of agricultural cooperatives should be exempted because their work is done for the benefit of the farmers who own the cooperatives we should honor that provision. But the legislative history of the existing definition clearly shows that no such result was intended.[19]"

It is these conclusions which, we submit, are not supported by the stipulated facts or the law applicable thereto.

The Stipulation shows (R. 12) that owners of dry, grazing or nonproductive land, who wished to convert their land into irrigated farm land, organized Petitioner as a mutual ditch company to construct, maintain and operate for them a

system of ditches and reservoirs to divert and carry *their* (the *farmers'*) water from the public streams to their land. This water, under the Colorado Constitution and Statutes, can be diverted only for the irrigation of the lands of the farmer stockholders of Petitioner, or their nominees, (R. 13). It is clear that the lands of the Petitioner's stockholders became "irrigated" lands only because of and through the farmers organization of Petitioner. These lands are located, for the most part, miles distant from the public streams. No one individual farmer, or no few farmers acting together, could afford to construct the miles of ditches and the reservoirs required to get their irrigation water from the streams to the land. As a matter of common knowledge, water for one farm or a few farms, if one or a few farmers "went it alone," would, as the result of seepage and evaporation, never reach the land sought to be irrigated. Hence, the several hundred owners of dry land went together and pooled their resources to construct an irrigation system by which all of their lands could be successfully irrigated.

The Court (p. 2) states that Petitioner "owns" the irrigation system. The Stipulation of Facts (R. 13) only states "the record title to the lands upon which defendant's canals and reservoirs are located stands in the name of the defendant." This is entirely different than an actual ownership in Petitioner. The record title to the ditches and reservoirs does stand in its name, but the equitable title and the real ownership are in its farmer stockholders whose lands are irrigated. Clearly, it would be cumbersome and impractical for the farmers who built and paid for (or are paying for, through the payment of Petitioner's outstanding bonds) the system to put and maintain the record title in several hundred names in different and varying proportions, so the "record title" is placed in a mutual ditch company (Petitioner) organized for that purpose as a matter of convenience.

Petitioner issued stock to the farmers who organized it

and who paid the initial cost and are paying subsequent costs for the construction of its system. Each share of stock represents a pro rata portion of the water diverted for all stockholders. *The stock does not represent the right to buy water* because Petitioner does not own any water to sell. The water right is owned by the farmer stockholders. As shown by the adjudication decrees pursuant to which the water is diverted from the public streams (R. 52), the water can be and is diverted only "for the benefit of the parties lawfully entitled thereto" who are the actual appropriators and users of water, namely, the farmer stockholders of Petitioner.

The Court (p. 8) comments upon the fact that Petitioner's employees do not actually apply the water to the stockholders' land, but that the farmer stockholders do that themselves. This is the case and is done so pursuant to By-laws which the farmers themselves adopted. Again, we submit, this is clearly a mere matter of administration. How impractical it would be for each farmer to go to the ditch or reservoir and operate the headgates and take his own water, or what he considers to be his pro rata share of the water diverted for all stockholders. The farmers themselves, in the interest of knowing that they will get their pro rata share of the water, adopted and imposed By-laws, for the protection of each farmer against the others, under which the ditch riders and lake tenders were directed by the farmers themselves to divide the water. The farmers have likewise decided that it would not be "good farming" to have these ditch riders (the number of which would be increased many times if such should be done) go onto the farms and actually apply the water.

The Court (pp. 2, 13) then comments upon the fact that Petitioner has an outstanding bond issue. True, and this represents an indebtedness created by the farmers themselves to help defray the cost of constructing their own irrigation system, which bond issue is secured by a Trust Deed lien on

the ditches and reservoirs. The ditches and reservoirs are worthless except to carry the water owned by the stockholders. They are part of the farmers' "water right." The Colorado Supreme Court has expressly so held in the several cases cited on page 34 of Petitioner's brief.[2]

Consequently, if this bond issue Trust Deed should be foreclosed, the farmers would lose their water right, including their physical irrigation system. To prevent this the farmers themselves annually levy upon themselves an assessment to pay bond principal and bond interest and maintenance and operation costs (including the employees' wages) to preserve their water right and secure their water (R. 16). This assessment is the only income Petitioner has; except an immaterial amount received from hunting licenses granted on some of the reservoirs. Petitioner can make no profit and can pay no dividends.

As shown by the Stipulation of Facts (R. 15, 16), the irrigation system is not subject to taxation to Petitioner. That irrigation system, under the Colorado mutual ditch laws and the Colorado Supreme Court decisions (only some of which are cited in Footnote 2, supra), as a part of the farmers' water right, is considered as an appurtenance to the land on which the water is used and, as a result thereof, that land is taxed at an increased value as "irrigated" land.

The above gives a correct picture of the nature of Petitioner as a mutual ditch or irrigation company.

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[2] **Kendrick v. Twin Lakes Res. Co.**, 58 Colo. 284, 144 P. 884;
Comstock v. Olney Springs Drainage Dist., 97 Colo. 416, 50 P. (2d) 531;
Beaty v. Board of County Commissioners of Otero County, 101 Colo. 346, 73 P. (2d) 982.

Quoting from the **Kendrick v. Twin Lakes Res. Co.** case, 144 P. 885:

"The dam in the old channel has no utility or value disconnected from the reservoir; that is, in and of itself. The essential thing or real value is in the impounded water or water rights in the reservoir, and it is only as the dam, as a part of the system, is used to impound water, that it has any utility or value whatever. It is a means to an end, which is the furnishing of a supply of water for irrigation to the stockholders. * * *"

Now we most respectfully, but with equal insistence and sincerity, ask how the Court can reasonably or logically conclude from these facts that the Petitioner is a "separate business organization" (p. 13) and that it "has been set up by the farmers as an independent entity to operate an integrated, unitary water supply system" (p. 13). How can it be questioned (p. 6) that Petitioner's activities are carried on "as part of the agricultural function" and that it was not "separately organized as an independent productive activity". How can it be said (p. 13) that "The function of supplying water has thus been divorced by the farmers from the farming operation" when the farmers collectively own the land, the water and the physical system of ditches and reservoirs, and pay the annual maintenance expense of Petitioner, the annual payments on the bonded indebtedness created by the farmer stockholders and the wages of all ditch riders and reservoir tenders. In fact, by the transfusion of this constant energy, attention and paying of annual assessments, the farmers supply the very lifeblood of Petitioner without which Petitioner would be useless and entirely dead. This is not a divorcement. The true nature of a mutual ditch or irrigation company, such as Petitioner, has been judicially declared by the Colorado Supreme Court in a number of cases cited on pages 30 and 31 of Petitioner's brief. We quote again from the Colorado Supreme Court in *Beaty v. Board of County Commissioners of Otero County*, 101 Colo. 346, 73 P. (2d) 985, as a typical holding of a number of Colorado Supreme Court cases:

> "* * * *. It definitely appears that this mutual canal company was organized for the convenience of its members in the distribution to them of their water for use upon their lands in proportion to their respective interests. Under these circumstances, the stock certificates of the canal company, in the form in which they were issued and held by the plaintiff, were merely the muniments of title to her water right, which water right, the thing of value owned by her, unques-

tionably was real estate and not corporate stock. This rule was clearly stated by Mr. Justice Butler in his concurring opinion, in which the majority of the court joined, in the case of Comstock v. Glenwood Springs Drainage District, 97 Colo. 416, 50 P. (2d) 531, 532 where it is said: 'Counsel for the plaintiff in error admit—and it is the law—that water rights for irrigation are real property. They say however, that shares of stock are personal property. That is true of shares of stock in corporations, including irrigation corporations, organized for profit; but where the company is a mutual irrigation company, or, as here, a mutual reservoir company, organized not for profit, but for the convenience of its members in the management of the irrigation system and in the distribution to them of water upon their lands in proportion to their respective interests, ownership of shares of stock in the corporation is but incidental to ownership of a water right, which is appurtenant to the land upon which the water is used.' See Ireton v. Idaho Irrigation Co., 30 Idaho 310, 317, 164 P. 687, 689. In Kendrick v. Twin Lakes Reservoir Co., 58 Colo. 281, 144 P. 884, we had occasion to pass upon the status of the capital stock of one of the companies involved here. We said: 'The corporation is purely a mutual reservoir company, in which the capital stock stands for and represents the consumer's interest in the reservoir, canal, and water rights'."

This judicial conception and determination of the nature of a mutual ditch or irrigation company as made by the Colorado Supreme Court is not limited to Colorado, but is common to all of the western semiarid States where irrigation prevails (see the authorities cited in Petitioner's brief at pages 32 et seq.).

The Court in this case, if the majority opinion is permitted to stand, is overruling the Supreme Court of the State of Colorado and the Appellate Courts of other western

States. We ask the Court not to do this, at least not without further consideration. We believe the principle of *Erie v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, to be applicable here. As recently as June 20, 1949, in *Interstate Oil Pipe Line Co. v. Stone*, this Court, in the majority opinion, written by Mr. Justice Rutledge and joined in by Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Murphy, and in its dissenting opinion, written by Mr. Justice Reed, joined in by the Chief Justice and Mr. Justice Frankfurter and Mr. Justice Jackson, reaffirmed the principle announced in the *Erie v. Tompkins* case and held that the Supreme Court was bound by the Mississippi Supreme Court construction of the Mississippi laws.

Again, in the cases of *Wheeling Steel Corporation v. Glander* and *National Distillers Products Corporation v. Glander*, also decided by this Court on June 20, 1949, and which cases involved Ohio tax statutes on intangibles, the Court expressly held it was bound by the Ohio Supreme Court construction of its own statutes, stating "whose interpretations for our purposes, become a part of the statutes."

The principle, so recenly followed in these cases, is applicable here. The Colorado Supreme Court in a long line of cases has judicially determined the nature of a mutual ditch or irrigation company, such as Petitioner, under the Colorado laws. So have the Appellate Courts of the other western semiarid States. It is not clear on what theory the Court can entirely ignore the Colorado Supreme Court determination of the Colorado laws as to the nature of a mutual irrigation company organized under those laws when, as recently as one week before the decision was handed down in this case, it affirmed the *Erie v. Tompkins* principle in the above referred to cases.

We again most respectfully ask the Court to give further consideration to this thought.

As held by the Colorado Supreme Court (and the

Courts of the other western semiarid States). Petitioner is not and cannot be a separate, independent organization, carrying on a business separate from its farmer stockholders. Its stock is merely a muniment of title to the water right which is owned by the stockholders and which stock evidences the stockholders' "interest in the reservoir, canal and water right" as the Colorado Supreme Court has expressly stated in the above quoted language from the *Beaty* case.

Clearly, by the Colorado Supreme Court decisions (and similar decisions in the other western States), Petitioner is engaged in agriculture in behalf of its stockholders and Petitioner's employees are likewise so engaged.

Every moment of his life the farmer in the irrigated West breathes "water." He worries all Winter as to what the water supply will be the coming Spring and Summer. That supply and the time when it is available determines whether he will have a crop and the extent thereof. If his land borders the stream, he may personally divert the water and apply it to the land. If it is distant, he may have one or more helpers. If it is still farther distant and he is a late comer, as a great majority of the farmers are, he must rely upon carriage through a ditch miles distant from the stream and a reservoir storage right in which water can be impounded in the flush Spring season. As above pointed out, to accomplish this, he has pooled his resources, past, present and future, with others, to secure that water to which he has the right under the State laws to receive through the medium of a mutual ditch company. He must take that water for his crops when it is available in the streams, and it is not always available. It may be one day a week or it may be seven days a week. His crops are thirsty for this water at all hours and on all days of the week. It may be daytime, but it is often nighttime when the water is available and must be taken and applied. The crops cannot recognize any time limit such as a 40-hour week in their absolute need for water, nor can the farmer who is attempting to raise crops.

We are apprehensive that the majority of the Court, distant as the Court is from the irrigated West, does not appreciate, what in the West is a matter of common knowledge, the inside nature of irrigation and the necessity of farmers to carry on that irrigation by whatever means are best suitable therefor, which, in a great many instances, is through the medium of a mutual ditch company. It is significant that the Trial Judge and the Judge who dissented in the Circuit Court of Appeals have lived a lifetime in the irrigated West and, no doubt, because of this close lifetime contact with irrigation, feel and know in their bones just how irrigation is carried on out here and that, whether that irrigation is carried on entirely by the farmer himself, or through immediate employees, or through his mutual irrigation company, an association with other farmers, it is all part and parcel of his agricultural contribution. Here in the West agriculture means irrigation, for all practical purposes, and irrigation means water on the land, and it is immaterial, for practical purposes, how the water gets on the land, just so it gets there.

While it is not a judicial authority, we think the following comment, which we have just received from an attorney for another mutual irrigation company in Colorado who has just read the Court's opinion, well summarizes what we have in mind:

> "I think the court wholly misunderstands the situation and does not give weight to the real fact that the only interstate commerce involved is farming or, in the more general sense, agriculture. The vicissitudes of irrigation, the uncertainty of water supply, and all the essential features of irrigation farming have been overlooked.
>
> "The little ditch grown into a large canal and as a protection, storage in reservoirs, and the necessity of conveyance by the convenience of the inter-

mediary corporate entity does not change the true situation.

"Ultimately the farmer himself applies the water as he needs it and he himself produces the goods which go into interstate commerce. He associates others with him, he finds it necessary to finance the transaction by personal borrowings or by bond issues of his representative, the company, but this still leaves it mere agriculture and farming.

"The water or the use of the water is his own. The means of application of the water are still the farmer's, even though he employs labor on his own place and pays it himself or he and his fellow farmer associates join in hiring employees to construct and operate the means of diversion of the water."

The Court in its majority opinion gives a number of examples of what has been held not to constitute agriculture. With these rulings we here have no quarrel. We submit, however, that they are not analogous to the facts shown in the present case. To our "irrigation" minds they are not only not analogous but they are as far different from the situation disclosed in the present case as day is from night.

The Court in its examples given cites the farmers cooperative situation. Clearly, a farmers cooperative or any other cooperative is a business enterprise in itself, even though, on the face of it, it may be a so-called nonprofit corporation. The Court then cites the tool manufacturing company and its employees, the fertilizer company and its employees and similar businesses which may sell materials of one kind or another to a farmer and which are useful to the farmer in his agricultural efforts. These are all examples of separate, independent businesses, as has been held. The employees of such companies, as the employees of power companies which furnish power to the farmers, may be within the general coverage of the Act because they are working in

a process or occupation necessary to the production of goods for commerce, but this does not answer the question as to whether they are themselves employed in agriculture. In the present case Petitioner's employees are engaged in an occupation which is an indivisible and essential part and parcel of irrigation which, in itself, is agriculture. These employees are not engaged in the business of manufacturing something which is sold to the farmers for agricultural purposes, but are engaged in the agriculture itself. Petitioner, as a mutual ditch company, is engaged in no manufacturing business, or any other kind of business separate and independent from the agricultural business of its farmer stockholders. It does not sell anything. It does not buy anything, except maintenance and operating tools and machinery required by the farmers to secure their water. It does not manufacture anything. Yet, as the agency of convenience of its farmer stockholders, it only diverts, carries and delivers to them their own water, the cost of which is defrayed by the stockholders the same as the cost of their plowing, their seeding and their harvesting.

VI.

THE DISSENTING OPINION OF MR. JUSTICE JACKSON

Petitioner's employees are held to be subject to the general coverage of the Act because they are engaged in the production of goods for commerce. Admittedly, the only "goods" that these employees are in any way connected with are agricultural goods. These employees do not actually produce the crops. They are held to be engaged in the production of goods for commerce and, hence, within the coverage of the Act only because under Section 3 (j) production of goods for commerce is made to include any employee engaged in "any process or occupation necessary to the production thereof."

We have heretofore urged that, as a matter of reason and logic, if Petitioner's employees can properly be held to

be engaged in the production of goods for commerce; then they must necessarily be engaged in agriculture. To us there seems to be no answer to this conclusion. The force of our contention appealed to the Trial Judge and it appealed to the dissenting Judge in the Court of Appeals, both of whom, as above stated, have had a lifelong contact with agriculture as it is carried on through irrigation in the West and who know what the common concept of agriculture and irrigation in the West is. The merit of our contention now appeals to Mr. Justice Jackson who has, in his dissenting opinion, in his own style, forcefully stated his views and ours. To us the Court's contrary conclusion is entirely illogical. We know from the reaction already evidenced by the farmers who have learned of the Court's opinion that they likewise fail to understand its logic, so, again, we respectfully request the Court to give further thought to the logic of its opinion.

VII.

THE COURT HAS CONSTRUED THE WAGE AND HOUR PROVISIONS OF THE ACT SO AS TO IMPOSE A PENALTY UPON THE FARMERS OF THE SEMIARID REGIONS OF THE WEST WHO REQUIRE IRRIGATION FOR THE GROWING OF CROPS AND WHO, BY NECESSITY, MUST IRRIGATE THOSE CROPS THROUGH THE MEDIUM OF THEIR MUTUAL DITCH COMPANIES, WHEN THE PLAIN WORDS OF THE ACT ITSELF SHOW THAT CONGRESS INTENDED TO FAVOR ALL FARMERS AND FREE THEM FROM ALL PENALTIES AND TO EXEMPT ALL EMPLOYERS ENGAGED IN AGRICULTURE AND THEIR EMPLOYEES FROM ALL PENALTIES. EMPLOYMENT IN AGRICULTURE IS THE MOST FAR-REACHING EXEMPTION IN THE ACT. THE JUDGMENT OF THE COURT, AS IT NOW STANDS, AMOUNTS TO JUDICIAL LEGISLATION

The Congressional intent to exempt agriculture in all its branches from the coverage of the Fair Labor Standards Act is expressly stated in the Act.

The indispensability of irrigation to agriculture in the semiarid States of the West has been recognized by this Court in any number of cases, including *State of Wyoming v. State of Colorado*, et al., 259 U. S. 496, 66L. Ed. 999, 1019, and *State of Nebraska v. State of Wyoming*, 325 U. S. 589, 89 L. Ed. 1815, 1819, cited and quoted from on pages 11 and 12 of Petitioner's brief.

In this case the Trial Court, the Court of Appeals, both majority and minority, and this Court in its several opinions all recognize that irrigation is necessary to agriculture and that the work performed by Petitioner's employees is necessary to that irrigation. This Court properly states that "necessary" is an understatement of the connection of Petitioner's employees with irrigation, which, in turn, admittedly is agriculture. We quote Footnote 6 on page 4 of this Court's opinion:

> "'Necessary' understates the case. The water supplied by the company's employees is, in this case, an indispensable prerequisite for agricultural production. Cultivation began only with irrigation and it will end if the irrigation ceases. Under such circumstances, there can be no doubt of the immediacy of the connection between the production, by the farmers, for commerce and the work of the petitioner's field employees in providing water for irrigation."

We submit that not only is the work of Petitioner's employees "an indispensable prerequisite for agricultural production" but, stated in another way, is an *integral* part and parcel of the irrigation of the crops of the farmer stockholders of Petitioner, without which there can be no irrigation and can be no agriculture.

We quote again from this Court's opinion in *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 88 L. Ed. 1488, 1493, 1496:

(page 1493)

"**** Congress provided for eleven exemptions from the controlling provisions relating to minimum wages or maximum hours of the Fair Labor Standards Act. *Employment in agriculture is probably the most far-reaching exemption.****", (emphasis supplied)

(page 1496)

"**** After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."

We realize that there is the rule commented upon in the opening section of this petition that exemption provisions in the Act should be strictly construed. However, we most seriously question whether any such rule should be applied to the agricultural exemption in the Act, which, according to the express language of Congress, is supposed to cover agriculture in all its branches. This Court has recognized the Congressional intent in stating in the *Addison* case, supra that "Employment in agriculture is probably the most far-reaching exemption."

The declared purpose of the Act (Sections 2 (a) and 2 (b)) was to correct and to eliminate "labor conditions" then existing that were "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers."

In order to correct these "detrimental" labor conditions in the industries where they existed, Congress decided to impose upon such industries the penalties found in Sections 6 and 7 of the Act.

Congress was aware of the fact that there were some industries "engaged in commerce or in the production of goods for commerce" where these "detrimental" labor conditions did not exist, and Congress freed such industries from the penalties found in Sections 6 and 7 of the Act by exempting all such industries and the employees of such industries, either in whole or in part (Section 13 (a)). Section 13 (a) (3) exempted "any employee employed as a seaman" and in Section 13 (a) (6) it exempted "any employee employed in agriculture," thereby emphatically and unconditionally completely releasing all employees engaged in these two exemptions; whereas, it only partially and conditionally releases employees in other industries.

There is no warrant in the Act itself to release some employers engaged in agriculture and to penalize other employers engaged in the same processes of agriculture. The penalties imposed by Section 6 and 7 of the Act on those who employ agricultural workers who are held not to be employed in agriculture are considerable and, in addition to the inequality between workers performing the same agricultural work, is a severe drain on the employer in meeting the requirements of time and a half and the penalties that can be recovered for past years, as well as future years; and all such penalties must be paid by the farmer stockholders of Petitioner and by no one else. The Petitioner has no money of its own; it has no means of raising money for the payment of these penalties and all such moneys must be obtained by assessments that the farmer stockholders themselves at stockholders' meetings levy upon themselves to be paid by such farmer stockholders the same as the farmer stockholders, by such assessments, pay off and discharge the mortgage indebtedness that they create against their own properties for the purpose of building and maintaining the system that they operate through their agent, the Petitioner. To impose these penalties upon the Petitioner is a subterfuge and a disregard of the consequences of so doing when it

is very apparent that the penalties must be paid by the farmer stockholder, who, Congress, by the plain wording of the Act, intended to protect and relieve from all burdens that existed in the year when the Act was passed in 1938 and that exist today and that are receiving the favorable consideration of Congress.

The Court says, on page 13:

> "****. There is a difference between the hiring of mutual servants by a group of employers and the creation by them of a separate business organization, with its own officers, property, and bonded indebtedness, which in turn hires working men.****"

The creation of this difference between workmen who work for individuals or a collective group of farmers and those who do the same work for those same farmers through the agency of a mutual ditch company amounts to judicial legislation, for this distinction is not warranted in any words found in the Act.

We conclude this petition with the thought that, whether a liberal rule of construction or a strict rule of construction be applied in the present case, Petitioner's employees are employed in agriculture within the meaning of the Act.

Dated: July, 1949

Respectfully submitted,

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I, JOHN P. AKOLT, of Denver, Colorado, do hereby certify that I am one of the attorneys for The Farmers Reservoir and Irrigation Company, Petitioner in the above petition named, and assisted in the preparation of the petition. I further certify that said petition is presented in good faith and not for delay.

JOHN P. AKOLT.